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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-1589, 74-1590

GENERAL ELECTRIC COMPANY,

Petitioner,

—v.—

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*

Respondents.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*,

Petitioners,

—v.—

GENERAL ELECTRIC COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF AMERICAN LIFE INSURANCE ASSOCIATION, HEALTH INSURANCE ASSOCIATION OF AMERICA, AND AMERICAN INSURANCE ASSOCIATION ON BEHALF OF PETITIONER

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Interest of the Amici

The American Life Insurance Association and the Health Insurance Association of America are associations whose membership comprise most of the major life and health insurers in the United States. Together they number among their members approximately 500 insurance companies, which are responsible for approximately 92% of the total life insurance in force in the United States and 90% of the total health insurance written by insurance companies. The American Insurance Association is comprised of approximately 140 members who, collectively, write approximately one-third of the property, casualty and surety coverage in the United States. The members of each of the amici are major employers with aggregate work forces of over 1,000,000 persons. As the nation's leading underwriters of temporary disability insurance, and as substantial employers, members of amici share a two-fold interest in the outcome of this litigation.

Because of the nature and extent of the business of their members the amici are particularly qualified to present to this Court data regarding the purposes for which disability benefits are provided, and the consequences of mandating such coverage on account of normal pregnancy. They employ on their staffs highly qualified actuaries experienced in the health insurance and disability insurance areas, who are familiar with actuarial data relevant to this case which might not otherwise be brought to the attention of the Court.

The Decision Below

In a 2-1 decision, handed down on June 27, 1975, the Fourth Circuit affirmed the determination of the trial court which, after a full hearing, held that the practice of the General Electric Company ("petitioner") with respect to the denial of disability income benefits on account of pregnancy violated Title VII of the Civil Rights Act of 1964.[1] Under petitioner's Sickness and Accident plan,[2] weekly benefits equal to 60% of an employee's weekly wage (up to a maximum of $150 per week) are paid to employees unable to work by reason of disability caused by non-occupational accident or sickness, for a period of up to 26 weeks.[3] Pregnancy is the only cause of disability excluded from coverage under petitioner's plan.

The court of appeals viewed this case as one of statutory construction.[4] It undertook, however, no review of the legislative history relating to the introduction of "sex" as a protected classification under Title VII. Rather, it spoke in general terms of the "obvious meaning and purpose" of Title VII to "prohibit any disparity of treatment

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[1] 78 Stat. 253, *as amended by* the Equal Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §§2000e *et seq.*

[2] While petitioner's plan is denominated a sickness and accident plan, the plan benefits are in the nature of a salary continuation payment of a type commonly referred to as a temporary or short-term disability benefit, as contrasted with a benefit providing for reimbursement of medical or hospital expense. Benefits paid under petitioner's sickness and accident plan will be referred to herein as disability benefits.

[3] *Gilbert* v. *General Electric Company*, 375 F. Supp. 367, 368 (E.D. Va. 1974), *aff'd* 519 F.2d 661 (4th Cir. 1975).

[4] 519 F.2d at 667.

in . . . conditions of employment between men and women . . . ,"[5] and of the "remedial purpose" of the Act.[6]

The court below accorded great weight to two Equal Employment Opportunity Commission sex discrimination Guidelines adopted eight years after the enactment of Title VII.[7] Citing this Court's decisions in previous Title VII cases dealing with the persuasiveness of other EEOC Guidelines, the court of appeals deferred to the Commission's interpretation of the statute, though noting the prior contrary position of that agency. The court characterized the present Guidelines as "merely expressive of . . . the obvious meaning and purpose of the Act."

The court of appeals rejected the argument raised by petitioner, that the "voluntary" nature of pregnancy distinguished disability on account of pregnancy from disability on account of sickness, and justified exclusion of the former from a sickness disability plan.[8]

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[5] *Id.* at 665 n.12.

[6] *Id.* at 663.

[7] 29 C.F.R. §§1604.9, 1604.10, 37 Fed. Reg. 6835, 6837 (April 5, 1972).

[8] Certain other issues raised by the parties in the Joint Petition of All Parties for a Writ of Certiorari, at 3-4 nn., such as the propriety of certifying this action under Rule 23(b)(2) of the Federal Rules of Civil Procedure, and whether certain evidence was properly admitted into or excluded from the record, are not discussed by the amici herein.

References to pages of the Appendix on this appeal shall be designated "(A. ....)".

Summary of Argument

In *Geduldig* v. *Aiello,* 417 U.S. 484 (1974), this Court upheld the exclusion of benefits on account of normal pregnancy from a state temporary disability insurance plan. In so ruling, this Court characterized the exclusion as a classification founded upon cause of disability—not one founded upon gender. Such characterization is determinative in a Title VII case as well as in a 14th amendment case, since in either context the distinction is risk-based and does not constitute discrimination on account of sex. Additionally the absence of two similarly situated groups who are treated differently precludes a finding of discrimination.

To confine the applicability of this Court's decision in *Geduldig* to state disability plans for privately employed workers would create artificial and anomalous distinctions based upon whether or not disability benefit coverage is obtained under a state plan. This could have the unfortunate effect of discouraging private coverage more extensive than state plan coverage.

The court of appeals' acceptance of the EEOC's 1972 pregnancy disability Guideline was erroneous. The available legislative history of Title VII, the almost universal practice at the time of Title VII's enactment to treat pregnancy differently from other causes of disability, and the contemporaneous interpretation of Title VII by the EEOC,[9] compel the conclusion that Congress did not intend to im-

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[9] As we show *infra* at 14-27, the present Guidelines relied on by the court of appeals in this action were adopted by the EEOC *eight years* after the enactment of Title VII. They are not only inconsistent with the original, and long-held interpretation of the statute by the EEOC and other agencies; but they were adopted

pose on the nation's employers a pregnancy disability program costing, at a minimum, hundreds of millions of dollars annually.[10]

Nor is such a burden required on the basis of an allegedly disparate effect on women resulting from the exclusion of pregnancy benefits. Even without such benefits, women receive more than their proportionate share of temporary disability benefits under existing plans. Consequently, no disparate effect within the meaning of this Court's ruling in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), can result from the exclusion of this one cause of disability.

The purposes for which temporary disability coverage is provided are not served by requiring the payment of disability benefits for normal pregnancy. The element of providing protection against an unanticipated loss of income is missing; pregnant women know of their impending "disability" in ample time to budget or plan for the future loss of earnings. Further, since so many women who leave employment by reason of pregnancy do not return to work,[11]

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without public hearing, and without any investigation or in-depth consideration of the issues raised by them; and are thus entitled to no deference by the courts. While these factors were discounted by the court of appeals, 519 F.2d at 664-65 n.12, because it believed the Guidelines to be in accordance with the intent of Congress, we submit that this conclusion is refuted by application of ordinary principles of statutory construction.

[10] In *Geduldig* v. *Aiello*, 417 U.S. at 494 n.18 estimates were submitted to this Court indicating that the additional cost of providing pregnancy disability benefits in the State of California, alone, would be between $48.9 million and $131 million annually.

[11] Experience has shown that, while over 95% of employees who receive disability benefits return to employment, as many as 50% of employees who leave work on account of pregnancy do not return. *See* discussion *infra* at 33-34.

disability benefits for pregnancy often do not serve the purpose of protecting the income of employees until they can return to the employer's work force; rather, such benefits become a form of severance pay.

Yet, if benefits on account of pregnancy were required by law, pregnancy would constitute the largest single cause of disability for which benefits are paid; absent additional contributions 22% of the average temporary disability benefit fund would have to be diverted to provide benefits for this single cause of disability. The result could well be to discourage the introduction of new or different coverages which could be of benefit to all employees, to require longer "waiting periods" or the imposition of other restrictions on eligibility for benefits, to increase the contributions required from employees, or to compel a decrease in benefits for other causes of disability.

ARGUMENT

Omission of Disability Benefits on Account of Pregnancy Does Not Constitute Discrimination on Account of Sex

Coverage for disability on account of pregnancy is not afforded under private temporary disability plans for the same reasons that such coverage is excluded under the California Disability Benefits Law, upheld by this Court in *Geduldig* v. *Aiello*.[12] Whether such exclusion constitutes sex discrimination under the 14th amendment as claimed in *Geduldig*, or under Title VII as claimed here, the threshold issue is the same:[13] does the classification or distinction arising from the exclusion of benefits on account of pregnancy constitute a classification or distinction on the basis of sex? The holding of this Court in *Geduldig*—that the exclusion of coverage for pregnancy involved a classification based on risk, not one based on sex—is, therefore, dispositive here.

The court below rejected the applicability of this Court's decision in *Geduldig* to a Title VII case. It viewed *Geduldig* as merely involving the question of whether the pregnancy exclusion sufficiently served the State's interest to satisfy the relevant 14th amendment standard.[14] This, we believe,

[12] 417 U.S. 484 (1974).

[13] *See Espinoza* v. *Farah Mfg. Co., Inc.*, 414 U.S. 86, 95 (1973); *Willingham* v. *Macon Tel. Publishing Co.*, 507 F.2d 1084, 1088 (5th Cir. 1975) (en banc); *Communications Workers of America* v. *American Tel. & Tel. Co., Long Lines Dep't*, 379 F. Supp. 679, 682 (S.D.N.Y. 1974), *rev'd*, 513 F.2d 1024 (2d Cir. 1975), *petition for cert. filed*, 43 U.S.L.W. 3684 (U.S. June 19, 1975) (No. 74-1601); *see also* Johnston, *Sex Discrimination and the Supreme Court—1971-1974*, 49 N.Y.U.L. Rev. 617, 691 & n.276 (1974).

[14] *Gilbert* v. *General Elec. Co.*, 519 F.2d 661, 665-67 (4th Cir. 1975).

is a misreading of this Court's decision. While *Geduldig* dealt with a 14th amendment claim, the language of that decision went far beyond the equal protection analysis necessary to sustain the statute under the 14th amendment. This Court could have upheld the statute without definitively characterizing the nature of the classification involved.[15] Similarly, it could have expressly reserved for later decision any intention to speak to Title VII issues.[16]

Instead, the Court did deal with the nature of the classification and concluded that the exclusion of pregnancy benefits did not discriminate on the basis of sex:[17]

[15] *See, e.g., Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 653 n.2 (1974) (Powell, J. concurring).

[16] *Id.* at 638-40 n.8; 656 n.6 (Powell, J. concurring).
It is notable that Mr. Justice Brennan, in his dissenting opinion in *Geduldig*, placed great emphasis on the EEOC's Guidelines under Title VII, despite the 14th amendment setting of that case, and expressly referred to the pregnancy disability Guideline at issue here. 417 U.S. at 501-02. Further, the EEOC, the *Geduldig* plaintiff, and various amici urged on the Court the importance of that case to Title VII litigation. *See, e.g.*, Brief of the United States Equal Employment Opportunity Commission as Amicus Curiae at 2, *Geduldig* v. *Aiello*, 417 U.S. 484 (1974).
Nevertheless, this Court did not expressly limit the applicability of its language and reasoning to the facts there before it, as it had done previously.

[17] 417 U.S. at 496-97 n.20 (emphasis added).
Accord, Communications Workers of America v. *American Tel. & Tel. Co., Long Lines Dep't*, 379 F. Supp. 679 (S.D.N.Y. 1974), *rev'd*, 513 F.2d 1024 (2d Cir. 1975), *petition for cert. filed*, 43 U.S.L.W. 3684 (U.S. June 19, 1975) (No. 74-1601); *cf. Kohr* v. *Weinberger*, 378 F. Supp. 1299, 1304 (E.D. Pa. 1974).
The impact upon Title VII of this Court's decision in *Geduldig* has been recognized even by commentators hostile to the result reached. *See* Johnston, *supra* note 8, at 691 & n.276; Comment, *Geduldig* v. *Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 Colum. L. Rev. 441, 456 (1975).

The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. *While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in Reed, supra, and Frontiero, supra. Normal pregnancy is an objectively identifiable physical condition with unique characteristics.*

• • •

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. *The program divides potential recipients into two groups—pregnant women and nonpregnant persons.* While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

This Court analyzed the *Geduldig* case as involving a risk-based, rather than a sex-based distinction:

> There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.
>
> The appellee simply contends that, although she has received insurance protection equivalent to that provided all other participating employees, she has suffered discrimination because she encountered a risk that was outside the program's protection.[18]

[18] 417 U.S. at 496-97.

This analysis goes to the heart of the issue presented here. As Judge Widener stated in his dissenting opinion below, *Gilbert* v. *General Electric Co.*, 519 F.2d 661, 668-69:

> Absent a showing of sex discrimination, Title VII, even if its reach were broader than the equal protection clause, would not render unlawful a pregnancy exclusion such as that involved here. Since the Supreme Court has held, for precisely the same exclusion, there is a "lack of identity between the excluded disability and gender as such," the exclusion should no more support a finding of discrimination under Title VII than under the equal protection clause.[19]

The argument that *Geduldig* is not persuasive in a Title VII context because different standards are applied under that statute and the 14th amendment to justify otherwise discriminatory conduct, misses the point. Once it has been determined, as in *Geduldig,* that no prohibited discrimination exists, whether a higher standard must be met under Title VII to justify otherwise discriminatory conduct becomes irrelevant.

Further, should this Court confine its holding in *Geduldig* to cases arising under the 14th amendment and involving state benefit plans, an anomalous situation will be created in several states which, by statute, require that employers provide some measure of temporary disability coverage to their employees, but expressly exclude or limit coverage of maternity under the state plan. *Geduldig* establishes

[19] *See also Communications Workers of America* v. *American Tel. & Tel. Co., Long Lines Dep't,* 379 F. Supp. 679, 682 (S.D.N.Y. 1974), *rev'd,* 513 F.2d 1024 (2d Cir. 1975), *petition for cert. filed,* 43 U.S.L.W. 3684 (U.S. June 19, 1975) (No. 74-1601).

that such exclusion does not constitute sex discrimination within the meaning of the 14th amendment. Thus, an employer who provides coverage to his work force through the state plan would incur no liability for a failure to furnish maternity benefits. However, if *Geduldig* were so limited and the same employer were to depart in the slightest from the statutory plan coverage, even to provide more generous benefits, the exclusion of benefits on account of pregnancy would arguably run afoul of Title VII.[20] In this connection it should be noted that General Electric Company is a self-insurer of weekly sickness and accident coverage under the California State Insurance Plan.[21]

Since the level of benefits provided under the state plan is often lower than the coverage provided by a private employer, this interpretation would have the ironic result of penalizing the generous employer and encouraging a dependence on state plan benefits even where it may have been the state's intention to encourage more liberal non-state fund coverage.

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[20] Such an interpretation has been espoused by the New York State Division of Human Rights. In attempting to reconcile the New York State Human Rights Law, N.Y. EXEC. L. §§290 *et seq.* (McKinney 1972), which bans sex discrimination, with the New York State Disability Benefits Law, N.Y. WORKMEN'S COMP. L. §§200 *et seq.* (McKinney 1965), which contains an exclusion of benefits on account of maternity, the agency has conceded that employers providing the minimal level of benefits through the state fund would not be guilty of sex discrimination in connection with the exclusion of maternity benefits. *See,* Brief of Respondent State Division of Human Rights, at 19, *American Airlines, Inc.* v. *State Human Rights Appeal Board (Kurtzer),* (Case No. CS-20674-73) (appeal pending, N.Y. App. Div., 1st Dep't).

[21] *Gilbert* v. *General Electric Company,* 375 F. Supp. 367, 371 (E.D. Va. 1974), *aff'd* 519 F.2d 661 (4th Cir. 1975).

The anomaly is further compounded by the fact that, as noted by Judge Widener in his dissenting opinion below,[22] those states whose disability benefit plans for private employees were validated by this Court's decision in *Geduldig* would themselves be liable under Title VII for including a pregnancy exclusion in the plans which provide coverage for their own employees.

The court below proceeded to ground its finding of discrimination on the premise that an exclusion of pregnancy coverage, "is 'inextricably sex-linked' in consequences and result . . .",[23] with the consequences falling adversely upon the members of a protected class of persons.

The inappropriateness of applying such a "disparate effect" analysis to this case is discussed below. It is sufficient to say here that a risk-based classification which distinguishes between pregnant and nonpregnant persons does not involve sex discrimination. The concept of discrimination presupposes two similarly situated groups who are treated differently. There can be no "similarly situated" male and female employees with respect to disability benefits on account of pregnancy.[24]

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[22] *Gilbert* v. *General Electric Company,* 519 F.2d 661, 669 (4th Cir. 1975) (dissenting opinion). *See also* Larson, *Sex Discrimination as to Maternity Benefits,* 1975 DUKE L.J. 805, 814-15 (1975).

[23] 519 F.2d at 664.

[24] *See Cohen* v. *Chesterfield County School Bd.,* 474 F.2d 395, 397-98 (4th Cir. 1973), *rev'd on other grounds sub nom. Cleveland Bd. of Educ.* v. *LaFleur,* 414 U.S. 632 (1974); *Rafford* v. *Randle Eastern Ambulance Serv., Inc.,* 348 F. Supp. 316, 320 (S.D. Fla. 1972).

The EEOC itself acknowledged that it was inappropriate to consider pregnant women similarly situated with sick disabled persons. The Commission's 1ST ANNUAL REPORT stated:

The complaint here, as in *Geduldig,* is not that male employees receive a benefit denied to female employees. Rather, it is that females are not protected when they encounter this particular additional risk. We submit that whether this complaint is made in a case under the 14th amendment, as in *Geduldig,* or in a case under Title VII, as here, the result must be the same. In either context the complaint does not involve discrimination on account of sex.

The EEOC Guidelines Here at Issue Should Be Rejected by This Court

In reaching its decision, the court below held that the EEOC's Guideline relating to pregnancy disability[25] reflected "the obvious meaning and purpose" of Title VII, and declared that courts were "directed to give 'great deference'" to such Guidelines in construing Title VII.[26]

The court below accorded deference to the Guidelines even though the EEOC did not arrive at its present inter-

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The prohibition against sex discrimination is especially difficult to apply with respect to the female employee who becomes pregnant. In all other questions involving sex discrimination, the underlying principle is the essential equality of treatment for male and female employees. *The pregnant female, however, has no analogous male counterpart and pregnancy necessarily must be treated uniquely.*

U.S. EEOC, 1ST ANNUAL REPORT, H.R. Doc. No. 86, 90th Cong., 1st Sess. 40 (1966) (emphasis added).

The same conclusion is reaffirmed in a series of opinion letters released by the EEOC General Counsel. *See* discussion *infra* at 16-18.

[25] 29 C.F.R. §1604.10(b), 37 Fed. Reg. 6835, 6837 (April 5, 1972).

[26] 519 F.2d at 664 & n.12.

pretation of the statute until 8 years after it was enacted. While noting that the EEOC's prior contrary interpretation subjected the Guidelines to the argument that they were "poor guides to a construction of [Title VII]," the court declared that this argument was adequately answered by the decision in *Wetzel* v. *Liberty Mutual Insurance Co.*[27] This deference to the EEOC Guidelines is undeserved and misplaced.

A. *The Guidelines Lack Those Features Which Induce Courts to Accord Deference to Administrative Interpretations*

The principles followed by courts in determining the weight to be accorded interpretations by administrative agencies are well known. First, courts look to see whether the interpretation in question has been consistently followed over a long period of time.[28] Second, courts look to the interpretation which is closest in proximity to the time of the enactment pursuant to which it is issued.[29] Third, courts examine the available evidence of the care and consideration given by the agency to the policy contained in the interpretation.[30] This Court has described the process to be followed:

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[27] 511 F.2d 199 (3d Cir.), *cert. granted,* 421 U.S. 987 (1975).

[28] *See Morton* v. *Ruiz,* 415 U.S. 199, 231 (1974); *FTC* v. *Jantzen, Inc.,* 356 F.2d 253, 257 n.4 (9th Cir. 1966), *rev'd on other grounds,* 386 U.S. 228 (1967); *O'Neill* v. *United States,* 281 F. Supp. 359, 364 (N.D. Ohio 1968), *aff'd* 410 F.2d 888 (6th Cir. 1969).

[29] *See Brennan* v. *General Tel. Co.,* 488 F.2d 157, 160 (5th Cir. 1973); *Newmon* v. *Delta Air Lines, Inc.,* 374 F. Supp. 238, 245 (N.D. Ga.), *aff'd,* 475 F.2d 768 (5th Cir. 1973) (per curiam) [rejecting the same EEOC pregnancy disability Guideline at issue in this case].

[30] *See United Housing Foundation, Inc.* v. *Forman,* 95 S. Ct. 2051, 2063-64 n.24 (1975); *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140 (1944).

> [t]he weight of such [administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[31]

Judged by these standards, the Guidelines at issue merit no deference. The facts relating to their promulgation underscore this. Title VII was enacted in 1964. In December 1965, the EEOC issued its first sex discrimination Guidelines.[32] From that date until April 1972, despite periodic amendments to the Guidelines,[33] the practice challenged in this proceeding escaped official condemnation.

Furthermore, between 1966 and 1969, the EEOC, through its General Counsel, responded to inquiries regarding the appropriate treatment of pregnancy under medical expense, leave of absence, and temporary disability plans, and declared that pregnancy need not be equated with sickness or disability. For example, in EEOC Dec. No. 70-360,[34] the Commission quoted an opinion letter of its General Counsel dated November 15, 1966:

> The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex . . . .

[31] *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

[32] 30 Fed. Reg. 14926 (Dec. 2, 1965).

[33] 33 Fed. Reg. 3344 (Feb. 24, 1968); 33 Fed. Reg. 11539 (Aug. 14, 1968); 34 Fed. Reg. 13367 (Aug. 19, 1969).

[34] 1973 CCH EEOC Decs. ¶6084 at 4130 (Dec. 16, 1969).

In an opinion letter addressed to the question of whether an employer could legally provide an unpaid maternity leave, where employees are entitled to paid sick leave, the EEOC General Counsel approved the practice, stating:

> [W]e do not believe that an employer must provide the same fringe benefits for pregnancy as he provides for illness . . . .[35]

And in a letter responding to an inquiry regarding the legality of excluding from a salary continuation program benefits on account of pregnancy—the precise issue before this Court—the EEOC General Counsel set forth language identical to that contained in EEOC Dec. No. 70-360 quoted above, and added:

> [I]t is our opinion that according to the facts stated above, a company's group-insurance program which covers hospital and medical expense for the delivery of employees' children, but excludes from its long-term salary continuation program those disabilities which result from pregnancy and childbirth *would not be in violation of Title VII.*[36]

Thus, from the outset, the EEOC's response to the problem posed here was that identical treatment of pregnancy and sickness or disability was *not* required.[37] It was not

[35] BNA F.E.P. Rep. 401:3032 (Nov. 15, 1966).

[36] BNA F.E.P. Rep. 401:3027 (Oct. 17, 1966) (emphasis added).

[37] Other EEOC General Counsel opinion letters emphasizing the propriety of treating maternity differently from sickness or injury include the following: BNA F.E.P. Rep. 401:3017 (Aug. 17, 1966) [requiring that maternity leave be given, even where other absences are grounds for separation from employment]; BNA F.E.P. Rep. 401:3030-31 (Nov. 10, 1966) [allowing exclusion

until April 1972, that the EEOC first generally published its current, contrary interpretation.

On what basis did the EEOC arrive at its new interpretation? It was not on the basis of public hearings. None were conducted.[38] It was not on the basis of studies or new information brought to the attention of the EEOC. The Chief of the Legislative Counsel Division of the EEOC at the time of the drafting of the Guidelines testified that she neither conducted nor was aware of any studies or data relating to similarities between pregnancy and other causes of disability.[39] There were no statutory developments which impelled or even suggested the conclusion that the existing EEOC position was incorrect.

One district court examined these circumstances and found the new EEOC position totally lacking in factual

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of pregnancy from disability benefit plan]; BNA F.E.P. REP. 401:3033-34 (Feb. 17, 1967) [maternity leave need not be granted on same terms as leave for sickness or disability].

[38] *See* 37 Fed. Reg. 6836 (April 5, 1972).

[39] *See* Brief of Alaska Airlines, Inc., et al., as Amici Curiae at 1a-6a, *Communications Workers of America* v. *American Tel. & Tel. Co., Long Lines Dep't*, 513 F.2d 1024 (2d Cir. 1975), *petition for cert. filed*, 43 U.S.L.W. 3684 (U.S. June 19, 1975) (No. 74-1601).

The cursory consideration given to the implications of its new position should be contrasted with the attention devoted to this matter by the EEOC during the first years after enactment of Title VII. Charles Duncan, General Counsel of the EEOC between August 8, 1965 and October 31, 1966, testified at the trial in this case (A. 649-65) that the position now taken by the EEOC was considered by the Commissioners during his tenure in office in the course of an extensive consideration of the appropriate treatment of maternity, and that the Commission chose, instead, to adopt the approach embodied in the General Counsel's opinion letters quoted above.

support.[40] Thus, there is nothing to indicate the expertise or thoroughness of consideration which are hallmarks of an administrative interpretation entitled to deference by the judiciary.

The court in *Wetzel* noted that in 1972 Congress did not amend Title VII with respect to the proscription of sex discrimination, and inferred from that a congressional endorsement of an expansive interpretation of the provision. 511 F.2d at 204.[41] The fact is, however, that such "endorsement" could not have encompassed approval of the EEOC's current pregnancy disability Guideline, since Congress was first informed of the new interpretation after enactment of the 1972 amendments.[42]

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[40] *Newmon* v. *Delta Air Lines, Inc.*, 374 F. Supp. 238, 245 (N.D. Ga.), *aff'd*, 475 F.2d 768 (5th Cir. 1973) (per curiam).

[41] A more trenchant analysis of the congressional inaction was provided by the Fifth Circuit Court of Appeals, sitting en banc, in *Willingham* v. *Macon Tel. Publishing Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975):

> while it is argued that a lack of any change in this section in the 1972 amendments to the Act evidences Congressional agreement with the position of the E.E.O.C., it may be argued with equal force that the law was insufficiently developed at the time the amendments were considered to support any change. We find the legislative history inconclusive at best and draw but one conclusion, and that by way of negative inference. Without more extensive consideration, Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate.

[42] While the first publication of the EEOC's current position with respect to pregnancy disability came in EEOC Dec. No. 71-1474, 1973 CCH EEOC DECS. ¶6221 (May 6, 1971), the first hint of any change in policy communicated to Congress came in the EEOC's SIXTH ANNUAL REPORT which was transmitted to Congress on March 30, 1972, six days after the enactment of the 1972 amendments on March 24, 1972. U.S. EEOC, SIXTH ANNUAL REPORT, H.R. Doc. No. 288, 92nd Cong., 2d Sess. 12 (1972).

This past term this Court declined to defer to an interpretation urged by the Securities and Exchange Commission stating:

> Traditionally the views of an agency charged with administering the governing statute would be entitled to considerable weight. . . . But in this case, the SEC's position flatly contradicts what appears to be a rather careful statement of the Commission's views in a recent release.
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> In view of this unexplained contradiction in the Commission's position we accord no special weight to its views. See *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U.S. 418, 426 (1972); *Blue Chip Stamps* v. *Manor Drug Stores* [43 U.S.L.W. 4707, 4714 n.10 (U.S. June 9, 1975)].[43]

Under the circumstances discussed above, the EEOC Guidelines at issue here are entitled to no better treatment.

B. *The Guidelines Are Inconsistent With the Legislative History of Title VII and Other Indicators of Legislative Intent*

This Court had occasion to consider another unfounded EEOC interpretation in *Espinoza* v. *Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973). There, the EEOC had issued a Guideline declaring that discrimination on the basis of citizenship constituted discrimination on the basis of national origin within the meaning of Title VII. This Court looked to the interpretation first placed on the statute by the EEOC—again, through its General Counsel's opinion letters—and to subsequent inconsistent congressional enact-

[43] *United Housing Foundation, Inc.* v. *Forman*, 95 S. Ct. 2051, 2063-64 n.24 (1975).

ments, in reaching the conclusion that the EEOC interpretation was not authorized by the statute. The court of appeals in *Wetzel*, 511 F.2d at 205, distinguished *Espinoza*, declaring that it could find no "obvious" indications of contrary congressional intent such as this Court there found. We submit that the court below and the *Wetzel* court have ignored or disregarded abundant "compelling indications" that the EEOC's interpretations are incorrect.

1. Legislative History

One such "compelling indication" is the complete lack of formal legislative history to support an interpretation having drastic and widespread consequences both in government and private industry. *See Willingham* v. *Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1090.[44] The absence of any meaningful formal legislative history pertaining to the Title VII proscription of sex discrimination has been widely recognized. The court of appeals in *Wetzel* referred to the available material as "meager", and noted that the provision was introduced into Title VII "in a tongue-in-cheek manner" in an effort to procure the defeat of the statute.[45]

Such fragments of legislative history as may be relevant suggest that Congress did not intend to mandate identical treatment of men and women with respect to fringe benefits.

[44] Had Congress wished to insert into this anti-discrimination law the requirement that pregnancy benefits be provided under a disability benefit plan, it would have taken little effort to make such an intention plain. *See Ozawa* v. *United States*, 260 U.S. 178, 192-94 (1922); *Toilet Goods Ass'n* v. *Finch*, 419 F.2d 21, 27 (2d Cir. 1969); *Friedman* v. *United States*, 374 F.2d 363, 366-67 (8th Cir. 1967); *Hecht* v. *Pro-Football, Inc.*, 444 F.2d 931, 945 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *Kettell* v. *Johnson & Johnson*, 337 F. Supp. 892, 895 (E.D. Ark. 1972); *Zachary* v. *R.H. Macy & Co., Inc.*, 31 N.Y.2d 443, 460 (1972).

[45] 511 F.2d at 204.

For example, Congresswoman St. George, in discussing the "sex" amendment, declared that women neither sought nor needed "special privileges".[46] Congresswoman Green, in her statements, made clear that no consideration had been given in committee to problems which might arise by reason of biological differences between men and women.[47] Finally, the inclusion of the Bennett Amendment[48] in Title VII, in order to harmonize interpretations under that statute and the Equal Pay Act[49] is of significance. Coupled with the interpretations of the Wage-Hour Administrator which did not compel employers to provide identical benefits to men and women, and the paramountcy given to Department of Labor interpretations, it is difficult to contend that Congress intended to introduce a requirement that identical benefits be paid.[50]

[46] 110 CONG. REC. 2581 (1964).

[47] 110 CONG. REC. 2584 (1964).

[48] Civil Rights Act of 1964, Section 703(h), 42 U.S.C. §2000e-2(h).

[49] 29 U.S.C. §206. *See* EEOC Guidelines, 30 Fed. Reg. 14926 (Dec. 5, 1965) (superseded); Fuentes, *Federal Remedial Sanctions—Focus on Title VII*, 5 VALPARAISO U.L. REV. 387, 392-93 (1971).

[50] Until the amendment of the EEOC's Guidelines in 1972, the EEOC regarded as non-discriminatory fringe benefit plans which complied with either the "equal payments" test (*i.e.*, where an employer spends an equal amount for male and female employees to provide benefits, despite the fact that the benefits purchased are unequal) or the "equal benefits" test (*i.e.*, where the benefits provided male and female employees are identical). *See* EEOC General Counsel opinion letter, BNA F.E.P. REP. 401:3011-12 (July 28, 1966). *See also* opinion letter, described in U.S. EEOC, FIRST ANNUAL DIGEST OF LEGAL INTERPRETATIONS, July 2, 1965 through July 1, 1966 at 22-23; U.S. EEOC, 1ST ANNUAL REPORT, *supra* note 24, at 41-42.

The use of an "equal payments" test under the Equal Pay Act was endorsed by the Department of Labor prior to July 2, 1965, the effective date of the employment provisions of Title VII. *See* Civil Rights Act of 1964, Section 716(a), 78 Stat. 266; Wage-Hour Administrator opinion letter, CCH WAGES & HOURS ¶30,851 (May 27, 1964).

While the Equal Pay Act only applies to discrimination in wages, and the Wage-Hour Administrator has ruled that benefits on account of pregnancy do not constitute "remuneration for employment", *see* Guidelines, 29 C.F.R. §800.110 (1967), the alternative "equal payments"/"equal benefits" tests have been applied to other forms of insurance coverage provided as fringe benefits to male and female employees.

2. Contemporaneous Practices and Interpretations

Another such indication is the fact that, when Title VII was enacted, pregnancy was generally treated differently from sickness and injury, both in and outside of government.

Both the EEOC and Department of Labor, following the enactment of Title VII, viewed pregnancy as a condition requiring individualized and flexible treatment.[51]

Federal agencies promulgated leave of absence regulations which denied or restricted the use of "advance sick leave" for pregnancy while permitting its use in connection with other causes of disability.[52] Federal agencies entered

[51] *See* discussion *supra* at 16-18; *cf.* OFCC Guidelines, 41 C.F.R. §60-20.3(g) (1970).

[52] *See, e.g.*, U.S. CIVIL SERV. COMM'N, PERSONNEL MANUAL, subch. 4-4 at 630-10 (June 1967); U.S. CIVIL SERV. COMM'N, FEDERAL PERSONNEL MANUAL, subch. 13-4(f) at 630-29 (rev., July 1969); U.S. Dep't of Justice, "Leave Policies and Regulations", Memo. No. 344, §V(D) at 18 (March 8, 1963); U.S. EEOC, Memorandum—"Advanced Sick Leave" (Dec. 20, 1972); *id.* (Jan. 26, 1973):

> It has been brought to our attention that . . . maternity cases were singled out as the only example in our . . . Memorandum dated December 20, 1972 [of a situation where use of advanced sick leave was unavailable]. Our reason for indicating maternity cases as a specific example was that GSA Payroll has,

into collective bargaining agreements which accorded "disparate" treatment to pregnancy under medical expense and hospitalization plans.[53] Some agencies even imposed a mandatory period prior to the expected date of delivery for the commencement of maternity leaves of absence,[54] while no similar period of absence was required in advance of elective surgery or other anticipated periods of disability.

State and local governments, as well as private industry, similarly accorded different treatment to pregnancy than was accorded to other causes of absence, medical expense and disability.

One survey of coverages provided state employees under state health insurance plans in effect in January 1973, disclosed that in virtually every plan examined which provided pregnancy coverage, the coverage provided differed from the coverage accorded other causes of medical expense or hospitalization.[55]

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on a continuing basis, refused to honor our requests for advance sick leave for normal pregnancy purposes since it is in direct conflict with U.S. Civil Service Commission rules and regulations.

[53] *See, e.g.*, 1973 Nat'l Ass'n of Letter Carriers Health Benefit Plan (U.S. Civ. Serv. Comm'n, Bureau of Retirement, Insurance, and Occupational Health, Form 41-51, Jan. 1973) at 3, 10; 1973 American Fed'n of Gov't. Employees Health Benefit Plan (U.S. Civ. Serv. Comm'n, Bureau of Retirement, Insurance, and Occupational Health, Form 41-26, Jan. 1973) at 3, 8.

[54] *See, e.g.*, U.S. Dep't of Justice, "Leave Policies and Regulations", *supra* note 52, §IV(D) at 17; U.S. EEOC, MANUAL §911(V) (Nov. 15, 1968 and July 25, 1969).

[55] *State Employee Health Insurance Plans* (Martin E. Segal Company 1973).

The temporary disability insurance laws of New York, California, New Jersey, and Rhode Island—the only such laws in effect in 1964—all either totally excluded benefits on account of normal pregnancy, or accorded to pregnancy disability, treatment less favorable than was accorded to other causes of disability.[56]

Congress must be presumed to have been aware of the practices and policies in effect at the time of the enactment of a statute.[57] If Congress wished to work a change in those practices, certainly it would have made its intention plain.[58]

3. The Known Cost Magnitude and Congressional Silence

Just as Congress gave no indication of an intention to alter existing nationwide practices with respect to the treatment of maternity by government and private industry, the record is similarly barren of evidence that Congress

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[56] In California and New York no benefits were payable on account of normal pregnancy. CAL. UNEMPL. INS. CODE §2626 (West 1972), *as amended*, CAL. UNEMPL. INS. CODE §§2626 and 2626.02 (West Supp. 1974); N.Y. WORKMEN'S COMP. L. §205 (McKinney 1965); N.J. STAT. ANN. §43:21-29 (1962) [maximum period of benefits is 4 weeks before and 4 weeks following delivery]; 5 RHODE ISL. GEN'L LAWS §28-41-8(1) (Supp. 1974) [benefits limited]. *Cf.* LAWS OF P.R. ANN., T. 11, Ch. 9, §203 (g)(2) (Supp. 1974) [no benefits payable on account of normal pregnancy] (enacted 1968); HAWAII, L. 1969, Ch. 148 [no benefits payable on account of pregnancy] (repealed).

[57] *See, e.g., Espinoza* v. *Farah Mfg. Co., Inc.*, 414 U.S. 86, 90-91 (1973); *American Fed'n of Musicians* v. *Wittstein*, 379 U.S. 171 (1964); *Ranes* v. *Office Employees Int'l Union*, 317 F.2d 915, 917-18 (7th Cir. 1963). *See also Employers Mut. Liability Ins. Co.* v. *Arrien*, 244 F. Supp. 110, 114 (N.D.N.Y. 1965).

[58] *See Ranes* v. *Office Employees Int'l Union*, 317 F.2d 915, 917-18. *See also* cases cited *supra* at note 44.

intended to enact a new and hugely expensive piece of social welfare legislation.

Yet the potentially staggering cost of requiring coverage for maternity was well known. At the time of the enactment of Title VII, the experience under the Rhode Island Temporary Disability Law, where pregnancy claims threatened to exhaust the benefit fund, was widely publicized.[59] In New York, the express exclusion of pregnancy under the State Disability Benefits Law[60] was explained in terms of cost:

> To provide the protection deemed necessary to the workers of the State at reasonable cost, disabilities arising from pregnancy have been excluded.[61]

Title VII and its legislative history contain no hint that any legislator voting on the bill had the slightest inten-

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[59] *See* Koontz, *Childbirth and Childbearing Leave: Job Related Benefits,* 17 N.Y.L.F. 480, 485 & n.36 (1971); Brief for Appellant at 10-12, *Geduldig* v. *Aiello,* 417 U.S. 484 (1974).

The Rhode Island statute was originally construed so as to treat pregnancy as fully compensable under the statute, regardless of whether or not the claimant was physically disabled. Because of the severe drain on the insurance fund which this interpretation imposed, the statute was amended in 1946 to restrict benefits for maternity to fifteen weeks; yet even then, pregnancy claims for the year 1949-50, comprised 23% of all claims and 30% of total benefits paid. BUREAU OF EMPLOYMENT SECURITY, U.S. DEP'T OF LABOR, RHODE ISLAND DISABILITY INSURANCE PROGRAM 42 (July 1954). The plan was subsequently further amended and presently provides a maximum $250.00 pregnancy benefit. 5 RHODE ISL. GEN'L LAWS §28-41-8(1) (Supp. 1974).

[60] N.Y. WORKMEN'S COMP. L. §205(3) (McKinney 1965).

[61] REPORT OF THE NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON INDUSTRIAL AND LABOR CONDITIONS FOR THE YEAR 1948, 11 NEW YORK LEGISLATIVE DOCUMENTS, 122nd Sess., Doc. No. 67, at 44 (1949).

tion to enact a multi-million dollar benefit program by the last minute addition to an anti-discrimination statute of a prohibition of sex discrimination. The failure of Congress to have considered the manifold problems raised by an interpretation of Title VII which would proscribe the exclusion of maternity disability benefits[62] provides convincing evidence that such an interpretation was not intended.

The Challenged Practices Do Not Constitute Discrimination on Account of Sex Under the Rationale of *Griggs* v. *Duke Power Co.*

Citing this Court's holding in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), the court below proceeded on the assumption that the case before it involved a practice whose

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[62] In promulgating a regulation prohibiting sex discrimination in the issuance, cancellation and renewal of insurance policies, the New York State Superintendent of Insurance specifically referred to the complexity of the policy issues involved:

> The proposed regulation does not mandate maternity benefits. While this issue is related to sex discrimination, it is essentially a different one: Do minimum health insurance requirements require the inclusion of maternity benefit insurance in basic health insurance contracts? Like the question of whether insurance coverage should be mandated for psychiatric care or alcoholism, a decision to mandate maternity benefits requires a balancing of the cost of providing such coverage and the importance and value of the social policy objective that the mandated coverage would realize. It also requires a determination of who should bear the cost of such insurance. . . . Such questions should be answered in proceedings specifically designed for this purpose. . . .

N.Y.S. Insurance Dep't, *In the Matter of Alleged Violations of Article IX-D of the Insurance Law,* OPINION AND REPORT PURSUANT TO SECTION 278 OF THE INSURANCE LAW at 4 n.5 (Jan. 28, 1975).

consequences worked a disparate effect on a protected class. To reach this conclusion the court relied on the premise that an exclusion of pregnancy coverage "is 'inextricably sex-linked' in consequences and result," since it "can result in a less comprehensive program of . . . benefits for women employees than for men employees." This "analysis" does no more than restate the truism that if one excludes coverage of a solely female cause of disability the effect will fall solely upon females.

By focusing merely on a single cause of disability, such an approach acquires superficial plausibility. However, "disparate effect" analysis is valid only where the exclusion affects similarly situated persons differently[63]—a result which is impossible when only benefits on account of pregnancy are considered. Male and female employees *are* similarly situated in the broader context of overall benefits on account of disability. However, when the scope of inquiry is so broadened, the disparate effect disappears.

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[63] This Court has made clear that the reach of Title VII extends to prohibit the use of even a neutral characteristic in such a manner as to have a disparate effect on the members of a protected class. Thus, in *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971), this Court struck down a company rule prohibiting the employment of women with pre-school-age children, since no such restriction was placed on the employment of males with pre-school-age children. Similarly, in *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), the court of appeals invalidated a rule forbidding the employment of married stewardesses, since no similar rule governing marital status was applied to male employees. These cases, however, involve neutral characteristics *which pertain to men and women.* It is only where both men and women are similarly situated, *i.e.*, share the capacity to be burdened or benefited by the allegedly discriminatory conduct, that an employer runs afoul of Title VII by failing to treat men and women alike.

As this Court found in *Geduldig,* women, even without maternity coverage, were receiving benefits identical in content (although superior in terms of cost and frequency of usage) to those provided male employees. These findings are consistent with nationwide experience under disability income plans.

It is recognized that, under typical disability income plans, women, as a group, receive benefits greater than are received by men, as a group, even where pregnancy benefits are excluded. Data published in United States Government publications, insurance and actuarial publications, and the experience of the members of our associations and of private employers throughout the country demonstrate that the relative costs of temporary disability benefits for women, *excluding* pregnancy benefits, is more than 1½ times the cost of benefits received by men under such plans.[64]

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[64] *See, e.g.*, TRANSACTIONS OF THE SOCIETY OF ACTUARIES: *1962 Reports of Mortality and Morbidity Experience,* Table 15 at 101 & text at 79; *1971 Reports of Mortality and Morbidity Experience,* Table 5 at 199-200 & text at 198; *1973 Reports of Mortality and Morbidity Experience,* Table 5 at 277 & text at 273.

This data is further supported by the experience of petitioner who found that in 1970 its average cost per insured employee of total benefits paid under its sickness and accident insurance plan was $82.57 for females and $45.76 for males; in 1971, the average cost of females was $112.91 and $62.08 for males (A. 198-99). Similarly, this Court noted in *Geduldig* that female employees, while providing 28% of total contributions to the California State Insurance Fund, were drawing 38% of the benefits paid out of the Fund. 417 U.S. at 497 n.21.

Comparisons of male and female frequencies of utilization of temporary disability benefits also leads to the conclusion that females receive a disproportionate share of such benefits. For data relating to petitioner's experience, *see* (A. 198-99). *See also* U.S. DEP'T OF HEW, VITAL AND HEALTH STATISTICS SERIES: *Time Lost from Work—1968* (Series 10, No. 71), Table 2; *Disability Days—United States—1971* (Series 10, No. 90), Table 5; *Current Estimates—1971* (Series 10, No. 79), Tables 2, 5, 6, 8; *Current Estimates—1972* (Series 10, No. 85), Tables 2, 5, 6, 8.

Indeed, it is estimated by our actuaries that by treating pregnancy identically with other causes of disability this disparity will be increased to the point where the cost of providing coverage for women will be almost 2½ times the cost of providing male benefits under disability plans.[65] Thus, from the perspective of overall coverage under disability benefit plans, women suffer no "disparate" effects.

Under these circumstances, penalizing an employer who excludes disability benefits on account of pregnancy is not only inequitable, it is illogical. The same employer would have no Title VII problem if, instead of providing disability benefit coverage, he distributed equally among his employees the amount of money he would have spent for such coverage. Yet under such circumstances, it is clear that the money so distributed, even if invested on a group insurance basis, could not provide female employees with disability benefits on account of pregnancy and also afford them coverage otherwise identical to that of male employees.

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[65] This estimate is predicated upon an average anticipated duration of pregnancy disability of 15 weeks under a typical plan offering 26 weeks of disability benefits, and a 21% increase in the number of female claims. The duration estimate approximates the actual experience in California prior to this Court's reversal of the lower court decision in *Geduldig*. *See* Affidavit of Carl M. Peterson, Deputy Chief of the Unemployment Insurance-Disability Insurance Section, and Supervisor of the Disability Insurance Group of the California Department of Human Resources Development, in support of the application of the State of California for a stay of judgment, *Geduldig* v. *Aiello*, 417 U.S. 484 (1974). In fact, this estimate may be overly conservative. *See* testimony of Paul H. Jackson at the trial of this case (A. 536-38), and G.E. Exhibit 42 (A. 846-48).

Furthermore, the "disparate effect" approach adopted by the court below could stimulate a veritable flood of additional litigation based upon claims of alleged discrimination. Carried to its logical conclusion, the courts could be called upon to examine any exclusion or limitation of coverage to discover whether it has a "discriminatory" impact on any protected group.[66]

Since no condition afflicts all protected groups identically,[67] the courts could be faced with the problem of evaluating whether disability plans containing any number of combinations of exclusions or limitations violate Title VII. This task of monitoring benefits provided in or excluded from benefit plans in order to create ideally balanced, "non-discriminatory" insurance, may well be an impossible one. The courts are neither equipped nor required[68] to perform such a task.

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[66] For example, as the district court noted in the *Wetzel* case, 372 F. Supp. 1146, 1162, gout is a condition which overwhelmingly afflicts males. Thus, any insurance policy which excludes or restricts the benefits available for this condition might be said to discriminate against men because the exclusion would have a disparate impact upon them.

[67] This is illustrated by the actual experience of a member of amici, in a study of non-maternity claims under certain group temporary disability income plans. This major stock life insurance company found that, for example, while hernias were responsible for 5.3% of total male days of disability in 1972, they only accounted for 1.6% of female days of disability during that period; on the other hand, disorders of the sex organs accounted for 10.1% of female days of disability, but only 2.0% of male days of disability in 1972.

[68] This is not to say that an employer would be free to manipulate his disability benefit plan by using a pretext to accomplish an invidious discrimination. For example, refusing coverage for sickle cell anemia might well constitute illegal discrimination against Black employees. To provide such coverage would not cause the gross distortion of benefit dollars which would be occasioned by

Payment of Disability Benefits on Account of Normal Pregnancy Does Not Further the Purposes of Temporary Disability Coverage

The decisions below are, at root, predicated upon an incomplete, and therefore distorted, view of the purpose of disability coverage. The district court focused solely upon the fact that, while benefit plans such as petitioner's are "purportedly designed to relieve the economic burden of physical incapacity," pregnant women undergo "undisputed" disability and attendant economic loss. 375 F. Supp. at 381. This description overlooks a number of other highly relevant considerations which distinguish pregnancy from other causes of disability for purposes of disability benefit coverage.

First, the major task of disability coverage is to provide protection for *unforeseen* and *unforeseeable* income loss occasioned by disability. While people may, indeed, engage in activities which carry with them some statistical risk of disability, people do not engage in such activities with the foreknowledge that they will become disabled. The nature of the risk is contingent, and the loss of income occasioned thereby generally cannot be budgeted for. In the case of pregnancy, however, some period of disability and resultant expense are not unforeseen. Couples know months in advance of the impending birth of their child and are in a

coverage of pregnancy disability. Where the cost of coverage is relatively minimal, and no valid reasons can be adduced to justify the exclusion, then the courts, as this Court made clear in *Geduldig*, 417 U.S. at 496-97 n.20, will be able to strike down pretextual invidious discrimination.

position to make provision for the loss in income which the wife may suffer.[69] Further, family planning is now widespread; as a result, a woman today has a great deal of control over whether or when she will become pregnant and whether she will bear a child.

Second, one of the most important reasons why employers offer temporary disability benefits to their workers is to provide a means of assisting them during periods of financial hardship until their return to the work force. In this manner employers generate loyalty among their workers and safeguard the investment in their training and experience. While available statistics indicate that virtually all employees who receive temporary disability benefits return to the work force, in the case of pregnancy, experience has shown that a substantial portion of pregnant employees will never return to work with the same employer.[70]

[69] The fact that a similar opportunity to plan for a period of disability may be possible in connection with certain other causes of disability must be viewed together with a recognition of the fact that the period and frequency of such disability and the expense involved are often minimal. *See* note 71, *infra*.

[70] Liberty Mutual Ins. Co. submitted an affidavit in *Wetzel* indicating that 80% of female employees who leave work on account of maternity fail to return to active service and similar data is available relating to other employers. The Illinois Bell Telephone Company, for example, found that while approximately 3% of employees absent by reason of sickness or accident did not return to active employment, more than 48% of those employees who went on maternity leave failed to return. Brief of American Telephone and Telegraph Co. as Amicus Curiae at 10a and n.10, *Geduldig* v. *Aiello*, 417 U.S. 484 (1974). The experience of the General Electric Company was that 40% of employees who leave for reason of maternity do not return (A. 600-01). Recently published data relating to the Xerox Corporation's disability benefit plan, where disability on account of pregnancy is treated identically with disability caused by sickness or accident, showed that in 1973 almost 54% of employees disabled on account of pregnancy did not return to work. Wall St. J., Nov. 11, 1975, at 1, col. 5.

Thus, for the woman who leaves employment to have her baby and who fails to return to service, payment of disability benefits constitutes a bonus—a form of severance pay. This, we suggest, is not the appropriate function of disability plans.

Third, employers, in establishing benefit plans, seek to provide those coverages most beneficial to their respective work forces as a whole. Often benefits to be offered are the subject of collective bargaining, and represent the joint efforts of management and labor to maximize the benefits derived from the funds available. As was discussed *supra* at 29-30, the introduction of mandatory pregnancy disability benefits will grossly distort the allocation of benefits under existing disability plans.[71]

The cost of requiring such coverage is too great to be ignored, and will have to be met either in the form of additional premium payments required of the employer or employee, or it will come at the expense of the work force in the form of a reduction of the existing level of benefits or deferral of additional coverage.[72] Whether, as a matter of

[71] It is this element of distortion of benefits which highlights the fallacy of the argument, suggested by the court below, that an employer who provides benefits for some causes of disability which are "voluntary" in nature (*e.g.*, elective surgery, cosmetic surgery, abortions, vasectomies, etc.), is required to provide such benefits for maternity. This argument loses sight of the relatively small dollar cost of such benefits. The decision to pay for these conditions has a positive effect on employee morale without distorting the allocation of benefits otherwise payable under the plan. There is no basis in sound employment practice, economics, or common sense for equating pregnancy coverage with coverage of other "voluntary" causes of disability. *See* Larson, *supra* note 22, at 820-21.

[72] The impact of requiring pregnancy coverage cannot be overstated. In the *Geduldig* case, this Court was presented with evidence that, to avoid increasing contributions to the State Fund, it would be necessary to significantly reduce benefits to avoid insolvency. The examples offered were to reduce the maximum benefit by almost 50%, or to increase the waiting period before benefits are payable from 7 to 46 days. Peterson Affidavit, *supra*, note 65.

social policy, it is desirable to mandate pregnancy coverage with its attendant burdens is a legislative judgment which, it is submitted, Congress did not make when it enacted Title VII.

CONCLUSION

In *Geduldig* v. *Aiello,* this Court confronted the issue of whether the exclusion of disability benefits on account of pregnancy was a sex-based distinction and concluded that it was not. This characterization transcends the equal protection context of *Geduldig* and is dispositive of this case, requiring a reversal of the decision below.

Viewing the case as one of statutory construction, as did the court below, yields the same result. The EEOC's first efforts to define sex discrimination in connection with fringe benefits recognized as much by expressing as EEOC's original goal, to "seek an equitable balance between the needs of the employer and employee. . . ."[73]

Where an employer procures for his work force a disability benefit plan designed to meet the needs of the entire work force in an equitable manner, he should be deemed to have complied with Title VII. Absent a finding that the exclusion at issue is "a mere pretext" used for a discriminatory purpose, the statute should not be construed

[73] EEOC General Counsel, opinion letter (Feb. 20, 1967) [summarized in CCH EMPL. PRAC. GUIDE ¶17,304.59].

to authorize or compel the federal courts to rearrange the disability benefit coverages offered by employers.

There is nothing to suggest that Congress by enacting Title VII—a generally worded anti-discrimination statute —intended to prohibit the practices here at issue. What Congress would have enacted with respect to maternity benefits, had it considered them, or indeed what action Congress may in the future take in other contexts with respect to that subject, is irrelevant. This Court should reject an interpretation which would create new social insurance legislation on the basis of a statute never intended to accomplish such a purpose.

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